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IN THE

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OCTOBER TERM, 1967

No. 1292

BUILDING AND CONSTRUCTION TRADES COUNCIL OF NEW ORLEANS, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF INTERNATIONAL UNION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA, AS AMICUS CURIAE

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INDEX

	Page
I. Interest of District 50	2
II. Reasons for Denying the Writ	2
A. There is no conflict	3
B. The court below properly enforced the Board's order	3
III. Conclusion	10

AUTHORITIES CITED

CASES:

Building and Construction Trades Council of New Orleans, AFL-CIO (Markwell & Hartz, Inc.), 155 NLRB 319 3

Local 761, International Union of Electrical, etc., Workers v. *N.L.R.B.*, 366 U.S. 667 .....3, 4, 5, 6, 7, 8, 9

Moore Dry Dock, 92 NLRB 547 5

Nashville Building and Construction Trades Council (Markwell & Hartz, Inc.), 164 NLRB No. 50, 65 LRRM 1149 3

N.L.R.B. v. *Denver Building & Construction Trades Council*, 341 U.S. 675 .....4, 5, 6

N.L.R.B. v. *International Rice Milling Co.*, 341 U.S. 665 ..... 5, 6

N.L.R.B. v. *Nashville Building and Construction Trades Council*, 383 F. 2d 562 3

Orange Belt District Council of Painters No. 48, AFL-CIO v. *N.L.R.B.*, 361 F. 2d 71 (1966) 3

Retail Fruit & Vegetable Clerks' Union (Crystal Palace Market), 116 NLRB 859-861, enf'd 249 F. 2d 591 (C.A. 9) 6

United Steelworkers v. *N.L.R.B. (Carrier Corp.)*, 376 U.S. 492 7

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BRIEF IN OPPOSITION OF INTERNATIONAL UNION OF DISTRICT 50, UNITED MINE WORKERS OF AMERICA, AS AMICUS CURIAE

International Union of District 50, United Mine Workers of America (herein called District 50), pursuant to consent of the parties under Rule 42 of this Court, files this *amicus curiae* brief in opposition to

the petition of the Building and Construction Trades Council of New Orleans, AFL-CIO (herein called Trades Council), for writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

I. INTEREST OF DISTRICT 50

District 50, a labor organization within the meaning of Section 2(5) of the National Labor Relations Act (herein called the Act), at all times material to this litigation was the duly recognized bargaining representative of the employees of Markwell and Hartz, Inc. (herein called Markwell), employed on the construction project involved in this matter—the filtration plant expansion of East Jefferson Water Works District No. 1, Jefferson Parish, Louisiana. Their employment was covered by an agreement between District 50 and Markwell establishing wages, hours and other terms and conditions of employment.

The secondary boycott activities of Trades Council were directed at disrupting the contractual relationship existing between District 50 and Markwell. Therefore, District 50 has a direct interest in this matter. District 50 was permitted, as *amicus curiae,* to participate in the oral argument heard by the National Labor Relations Board (herein called the Board) in the proceedings before it, and to file a brief with and participate in the oral argument before the Fifth Circuit Court of Appeals.

II. REASONS FOR DENYING THE WRIT

District 50, in general, adopts the arguments in opposition to the issuance of the writ set forth in the Board's brief, presenting, in addition, the following:

A. There Is No Conflict

There is no conflict between the circuits on the question presented; to the contrary, there is harmony. The Sixth Circuit, in *N.L.R.B.* v. *Nashville Building and Construction Trades Council,* 383 F.2d 562, had the identical question for review. In that case, the Sixth Circuit, in an unanimous decision issued on October 5, 1967 (two months prior to the decision of the Fifth Circuit sought here to be brought up on writ of certiorari), enforced the Board's order in *Nashville Building and Construction Trades Council (Markwell & Hartz, Inc.),* 164 NLRB No. 50, 65 LRRM 1149. The Board's decision and order in the latter case, which issued on May 2, 1967, was expressly bottomed on the earlier (October 25, 1965) decision and order of the Board in *Building and Construction Trades Council of New Orleans, AFL-CIO (Markwell & Hartz, Inc.),* 155 NLRB 319, which decision and order was enforced by the majority of the Fifth Circuit in the instant matter.

The only other circuit to consider a similar question was the District of Columbia Circuit in *Orange Belt District Council of Painters No. 48, AFL-CIO* v. *N.L.R.B.,* 361 F.2d 71 (1966). In that case the court, on the record "as a whole", rejected the union's argument that under the *General Electric* decision of this Court (*Local 761, International Union of Electrical, etc., Workers* v. *N.L.R.B.,* 366 U.S. 667), the "'reserve gate' doctrine" "cannot be applied to invalidate picketing at a common construction site."

B. The Court Below Properly Enforced the Board's Order

Trades Council's argument, in substance, is that this Court's decision in the *General Electric* case *sub-silentio* overruled the earlier decision of the Court in

the *Denver Building Trades* case (*N.L.R.B.* v. *Denver Building & Construction Trades Council*, 341 U.S. 675). In the latter case, decided in 1951, the Court upheld the Board's conclusions that, for the purposes of the secondary boycott section of the Act, contractors and subcontractors on a construction site were to be treated as separate employers (341 U.S., at pp. 689-690) and that proscribed conduct to force one such contractor or subcontractor to cease doing business with another at the construction site was prohibited by that section (341 U.S., pp. 687-689). This view of the Act has been consistently adhered to by the Board and the courts.

Trades Council's argument is predicated on the holding in *General Electric* that in a situation like involved there a separate gate may be established to isolate from the disputes of the primary employer only secondary employers whose services are "unconnected to the normal operations of the struck employer" (366 U.S., p. 680). The Trades Council's argument, in effect, is that the operations of each contractor or subcontractor on a construction site are connected to those of the others. But this interrelationship of one contractor to another on a construction site was fully recognized by this Court in *Denver Building Trades* and rejected as justification for not applying the secondary boycott provisions of the Act to disputes at construction sites. Thus, as the Court there (341 U.S., at pp. 689-690) stated:

> "We agree with the Board also in its conclusion that the fact that the contractor and subcontractor were engaged on the same construction project, and that the contractor had some supervision over the subcontractor's work, did not eliminate the status of each as an independent contractor or make the employees of one the employees of the other. The

> business relationship between independent contractors is too well established in the law to be overridden without clear language doing so. * * *"

The first point we wish to make is that there is no legal or logical foundation for the Trades Council's argument that *General Electric sub-silentio* overruled *Denver Building Trades.* The *General Electric* case involved the question of whether the primary employer there, a struck manufacturer, could set apart a separate gate for the use of the employees of employers coming to his plant to do business with him in order to isolate them from the consequences of the primary picketing at the plant. In other words, neither the *Denver Building Trades* holding regarding the independent status of contractors and subcontractors on construction sites nor the application of the *Moore Dry Dock* (92 NLRB 547, 549) criteria to common situs picketing—such as a construction site—was presented for review. Rather, what was presented to this Court in *General Electric* in 1961 was whether the traditional right of a union to shut down the entire plant premises of the primary employer to those coming there was in any respect curtailed by the secondary boycott section of the Act. Previously, in *N.L.R.B.* v. *International Rice Milling Co.,* 341 U.S. 665 (cited in *General Electric,* 366 U.S., at p. 672), this Court had held on the facts there presented that picketing and other direct activities to close the plant of the primary employer to employees of other employers coming to the primary premises was not prohibited by the secondary boycott section.[1] Thus, if any case was up

[1] The specific question presented in *International Rice Milling* was whether the section banned the union's direct action to restrain the employees of a customer of the plant from crossing the picket line to pick up plant products for their employer (see 341 U.S., pp. 669-670).

for reexamination in *General Electric* it was *International Rice Milling,* not *Denver Building Trades* (see 366 U.S., pp. 674-679).

Moreover, by holding in *General Electric* that the primary employer could establish a separate gate to isolate certain employers and their employees coming to the primary premises from the plant dispute, this Court limited activities by a union at primary premises previously regarded as without limitation. It is indeed anomalous to argue that an interpretation of the Act which limits boycott rights at primary plant premises *sub-silentio* expands such rights at common situs construction sites.

As the Board noted (R. 86), unlike *General Electric,* which involved picketing at the premises of the primary employer, the picketing in the instant case was at the premises of a neutral person (the East Jefferson Water Works) on which the primary employer (Markwell) and others (Binnings and Barnes) were engaged in construction work for the neutral.

What the Trades Council anomalously argues, in effect, is that the *General Electric* case grants a right, not existing before, to the primary employer, at the primary employer's own premises, to isolate certain secondary employers working at the primary premises from the consequences of the primary dispute by the establishment of a separate gate at such primary premises for such secondary employers, but at the same time *sub-silentio* withdraws rights previously existing in employers at common sites similarly to be isolated from the disputes of others at the site,[2] even when the

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[2] See *Retail Fruit & Vegetable Clerks' Union (Crystal Palace Market),* 116 NLRB 859-861, enf'd 249 F. 2d 591 (C.A. 9), cited in *General Electric,* 366 U.S., at pp. 678-679.

construction site is at the premises of a neutral as here. There is no foundation in *General Electric* for such an inference.

This Court subsequently in *United Steelworkers* v. *N.L.R.B. (Carrier Corp.)*, 376 U.S. 492, made clear that the *General Electric* decision was restricted to consideration of separate gate picketing at a "primary employer's plant" and to the conditions for its legality. As the Court there stated (at pp. 497-498):

> "The Court [in *General Electric*] accepted neither the approach of the Board nor of the Union. The location of the picketing, though important, was not deemed of decisive significance; picketing was not to be protected simply because it occurred at the site of the *primary employer's plant*. Neither, however, was all picketing forbidden where occurring at gates not used by primary employees. The legality of separate gate picketing depended upon the type of work being done by the employees who used that gate; if the duties of those employees were connected with the normal operations of the employer, picketing directed at them was protected primary activity, but if their work was unrelated to the day-to-day operation of the *employer's plant*, the picketing was an unfair labor practice. * * *" (Emphasis added)

Our next point is, were *General Electric* applicable to a construction site and the standards there set forth for appraising the legality of separate gate picketing at a struck plant deemed to control the legality of separate gate picketing at a construction site, the Board's finding of unlawful picketing in the instant case nonetheless would have to be sustained.

In the first place, the employers whom this Court in *General Electric* held could be isolated from the pri-

mary employer's dispute at the plant were, as here, employers engaged in the construction industry, at least some of whom had direct contracts with the primary employer and were responsible to it for their final product. Also, the work of these employers was not totally "[un]connected with the normal operations of the [primary] employer", or totally "unrelated to the day-to-day operation of the [primary] employer's plant" (*Carrier Corp., supra*). Next week, next month, or next year the construction work being performed was to become part of the plant and part of the "normal" "day-to-day" operation of the primary employer. In the meantime, the Court held, their operations could be segregated from the normal operations of the plant; the only employers who could not be segregated were those contributing to the day-to-day operations of the existing plant, such as those performing pick-up and delivery and maintenance services.

Like the primary employer in *General Electric,* Markwell here contracted out certain construction work to be performed by others and retained some work to be performed by its own employees, as is the practice in the industry. Thereafter, the construction work contracted out became, like in *General Electric,* the work of those to whom it was contracted; what work Markwell retained constituted it normal, day-to-day operations on the construction site under *General Electric.* Under the *General Electric* principle then Markwell, as it did, could establish separate gates to isolate its subcontractors from its dispute as long as employers doing business with it, such as its material men and suppliers, did not violate the separate gates by using them. There is no contention here that there was any such violation of the separate gates after they were fully established.

Our last point is this, were Trades Council correct in its contention, it would mean that *General Electric,* while extending the secondary boycott prohibition to certain picketing and other conduct at primary plant premises, *sub-silentio* eliminated entirely its application to the construction industry. Thus, although a manufacturer with a labor dispute at his plant may isolate construction contractors working at his premises from the consequences of his dispute at the plant, it would mean that were the labor dispute with one of the contractors working at his premises he would be powerless to isolate the other contractors on his premises, and perhaps himself, from such dispute. Also, if a union may lawfully picket a segregated gate at a construction site, it may lawfully appeal directly to the employees of the secondary contractors at the site to honor its picket line; if it may do this, it may lawfully induce a total strike of a construction project to force one contractor thereon to cease doing business with another contractor.

But this *sub-silentio* consequence of the *General Electric* decision, urged by Trades Council—total exemption of the construction industry from the secondary boycott prohibition of the Act—would accomplish the very result which the building trades unions of the AFL-CIO for years unsuccessfully have sought in Congress, and today are still seeking. There is no basis for the argument that this Court, in a case which did not involve the issue, embarked upon such a major revision of the law, denied by Congress, especially without clearly disclosing its intent to do so and explicating its reasons for so doing.

The absence of confidence in the arguments here advanced for certiorari is fully demonstrated by the continued push for Congressional amendment of the Act.

III. CONCLUSION

For the reasons aforesaid, the petition for writ of certiorari should be denied.

Respectfully submitted,

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